A

## CM INDAH SDN BHD

**v.**

## UB USHABINA SDN BHD

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 1-22-7-2004]
11 OCTOBER 2006

C ***CONTRACT:*** *Building contract - Lump sum contract - Claim by plaintiff for sum due and owing by defendant for completion of subcontract works - Summary judgment - Whether there were triable issues - Rules of the High Court 1980, O. 14*

D ***CIVIL PROCEDURE:*** *Summary judgment - Contract - Lump sum contract - Claim by plaintiff for sum due and owing by defendant for completion of subcontract works - Triable issues - Rules of the High Court 1980, O. 14*

E This was an appeal by the plaintiff against the decision of the learned registrar dismissing the plaintiff's application for summary judgment under O. 14 Rules of the High Court 1980. The plaintiff's claim against the defendant was for the sum of RM496,429.78 ('said sum') due and owing by the defendant for subcontract works completed by the plaintiff for the defendant.
F The said sum included the retention sum and arrears for construction works, variations and additional works in a certain project ('project'). The defendant contended: (i) that the subcontract between the plaintiff and the defendant was a lump sum contract without any provision for variation works; (ii) that
G there were defects in the works carried out by the plaintiff which the plaintiff had a duty to remedy; (iii) as to whether the defendant's "site officers" were qualified to sign the plaintiff's Request for Inspection forms on behalf of the defendant; (iv) that the delay in the completion of the plaintiff's works resulted in the
H defendant having to pay liquidated and ascertained damages to the principal; and (v) that the plaintiff's claim for the retention sum was premature as it could only be released after the issuance of the certificate of practical completion and after the expiry of the defects liability period.

I

**Held (allowing the appeal):**

**(1)** In the instant case, although the parties herein had entered into a lump sum contract, the plaintiff as the contractor was nevertheless entitled to claim further payments if extra works in the form of variations and additional works had been carried out and completed, as agreed by the contracting parties. A perusal of the plaintiff's affidavit in support showed: (a) exh. CM15 *ie*, the defendant's letter dated 31 January 2000 instructing the plaintiff to construct a Tie-Beam to the project as an additional work to the lump sum contract; (b) the defendant's memorandum dated 17 July 2001 asking the plaintiff to carry out a variation "to the store room in Block B level 1 to FCC Room (M&E)", and the positioning and size of the door and window; and (c) exh. CM19 setting out in detail the specifications of the defendant's variation orders, and instructions for additional works to be carried out and completed by the plaintiff. In light of the above overwhelming and undisputed contemporary documents emanating from the defendant, the defendant's submission could not be accepted. (paras 17, 18, 19, 20, 21 & 22)

**(2)** *Vide* the plaintiff's letter dated 9 June 2003 relating to the parties' discussions on the variation order, rectification works and payment, the plaintiff confirmed the parties' agreement on the variation order for the sum of RM309,715.59 and that the defendant would pay the outstanding balance for the contract works. Thereafter, the plaintiff would carry out the remedial works. It was significant to note that the defendant had not responded to the plaintiff's said letter. In the circumstances, the defects raised for the defendant being devoid of particulars could not constitute a triable issue. (paras 26 & 27)

**(3)** The request for Inspection forms had been sent by the plaintiff to the defendant *vide* letter dated 22 July 2002, confirming the handing over of the door keys. These forms had been duly signed by the defendant's site officers who had jointly inspected the project and were satisfied with the practical completion, and for which the plaintiff requested the defendant to issue the certificate for practical completion. Each of these forms had been endorsed with the defendant's rubber stamp. Prior to this, there had been no complaint by the defendant as to the capacity of these site officers signing on behalf of

A the defendant. It was, therefore, untenable for the defendant to raise this issue at this juncture in order to frustrate the plaintiff's claim. (para 30)

**(4)** The defendant's submission based on the plaintiff's delay was
B a bare allegation devoid of particulars. If the plaintiff had truly occasioned a delay, the defendant would have been able to provide the necessary particulars by way of set-off or counterclaim in order to prevent the signing of summary judgment, but the defendant had not done so. A bare claim
C for damages for delay without giving some reasonable detail or quantification was unlikely to result in any leave to defend. (paras 33 & 34)

**(5)** Upon a true construction of cl. III of para. E of the contract,
D the release of the retention sum was to be effected upon the expiry of the defects liability period. There was no requirement that the release thereof was subject to the defendant's issuance of the certificate of practical completion. This issue raised for the defendant was nowhere to be found in the
E contract, upon which the parties had agreed. As there was no dispute that the defects liability period had expired, it followed that the plaintiff was entitled to the release of the retention sum. (paras 38 & 39)

**(6)** As the defendant had obviously failed to raise any triable
F issues, summary judgment ought to have been entered for the plaintiff. (para 40)

**Case(s) referred to:**

*Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC* ***(refd)***

G *Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14

H **Other source(s) referred to:**

*Keating on Building Contracts,* Sweet & Maxwell 1991, 5th edn, pp 69, 442

Robert Fenwick Elliot, *Building Contracts Litigation,* pp 1, 2

*For the plaintiff - Rusdy Ishak; M/s Lim & Yeoh*

I *For the defendant - Ravinathan Muthiah; M/s Ravi Muthiah & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Low Hop Bing J:**

### Appeal

**[1]** The learned registrar has on 29 September 2004 dismissed the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiff has now appealed against the said decision.

### Factual Background

**[2]** The plaintiff's claim against the defendant is for the sum of RM496,429.78 ("the said sum") due and owing by the defendant for sub-contract works completed by the plaintiff for the defendant. The said sum includes the retention sum and arrears for construction works, variations and additional works in the project in Universiti Teknologi Malaysia, Skudai, Johor ("the project").

**[3]** The defendant has appointed the plaintiff to carry out and complete the project *vide* letter of award dated 1 October 1999 which the plaintiff has agreed to do.

**[4]** The relevant details of the project are:

(1) Bachelor Students' Hostel which the plaintiff has completed and delivered vacant possession to the defendant on 22 July 2002, pursuant to the joint inspection by the plaintiff and the defendant. The plaintiff issued the final claim as follows:

| Item | RM |
|---|---|
| (a) Variations and additional works | 175,048 |
| (b) Retention sum | 225,000 |
| Total | 400,048 |

(2) Construction of Students' Arcade for which the plaintiff claims:

| Item | RM |
|---|---|
| (a) Balance sum for construction works, variations and additional works | 43,670.78 |
| (b) Retention sum | 43,000.00 |
| Total | 86,000.00 |

(3) Construction of TNB Substation (single chamber); and

(4) Construction of TNB Substation (double chamber).

**[5]** The plaintiff's claim for both (3) and (4) above are:

| Item | RM |
|---|---|
| (a) Balance sum for construction works | 4,861.00 |
| (b) Retention sum | 4,850.00 |
| | 9,711.00 |

**[6]** All the above construction works had been carried out and completed almost simultaneously.

**[7]** The plaintiff *vide* letter of demand dated 12 August 2003 made an overall claim for the said sum which the defendant failed or refused to pay.

**[8]** A repeated demand was made by the plaintiff *vide* solicitors' letter dated 13 October 2003. The defendant still failed or refused to pay. Hence, the plaintiff's claim herein.

**Function In Hearing An O. 14 Application**

**[9]** The function of a judge hearing an O. 14 application has been set out in the majority judgment delivered by Mohamed Azmi SCJ (as he then was) for the then Supreme Court in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 where the salient principles may be stated as follows:

(1) Basic to the application is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable;

(2) The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court;

(3) On the treatment of conflict of evidence on affidavits, although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statement by the same deponent, or inherently improbable in itself it may be, following the advice delivered for the Privy Council by Lord Diplock in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at p. 217;

(4) Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit; and

(5) Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

**[10]** Mindful of these principles, I shall now proceed to consider the issues raised herein.

## Lump Sum Contract

**[11]** Defendant's learned counsel Mr. Ravinathan Muthiah submitted that the sub-contract between the plaintiff and the defendant was a lump sum contract without any provision for variation works.

**[12]** Mr. Rusdy bin Ishak, plaintiff's learned counsel contended that the lump sum contract did not preclude the plaintiff from claiming for variations and additional works which the defendant had actually instructed the plaintiff to do and complete.

**[13]** It is essential for me to set out the legal effect of a "lump sum contract" in relation to construction or building contracts. For this purpose, I find it instructive to refer to the views of learned authors.

**[14]** In *Building Contract Litigation* by Robert Fenwick Elliot, at pp. 1 to 2, the following passage appears:

> *(a) Lump sum contracts*
>
> A lump sum contract is a contract whereby the contractor agrees for a pre-agreed price to execute certain defined building works (the building work undertaken by the contractual obligation is usually called the 'Works'). In principle, the contract is very simple but in practice there are many complicating factors.
>
> The general rule in ordinary lump sum contracts is that the contractor is entitled to be paid the pre-agreed lump sum as and when he substantially completes the *Works (Hoenig v. Isaacs* [1952] 2 All ER 176). Substantial completion does not necessarily entail the perfect execution of every detail of the Works, and if the contractor is guilty of only comparatively minor defects and/or omissions then he is entitled to be paid the lump sum less a set-off in respect of his failings…
>
> …
>
> Although the lump sum is always the starting point, it is compartively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. The lump sum is usually subject to adjustment for extra work, fluctuations sub-contractors, and so on;

**[15]** At p. 69 in *Keating on Building Contracts*, a lump sum contract is described as:

> …
>
> a contract to complete a whole work for a lump sum, e.g. to build a house for £60,000. If the house is completed in every detail required by the contract the contractor is entitled to £60,000, and if extra work was carried out he may be able to recover further payment.

**[16]** I adopt and apply the above statements.

**[17]** In the instant case, although parties herein have entered into a lump sum contract, the plaintiff as the contractor is nevertheless entitled to claim further payments if extra works in the form of variations and additional works had been carried out and completed, as agreed by the contracting parties.

**[18]** The question that follows is whether there is any agreement between the parties herein for variations and additional works in order to entitle the plaintiff to recover further payments therefor.

**[19]** In this regard, it is necessary for me to consider the plaintiff's affidavit in support. Exhibit CMI5 is the defendant's letter dated 31 January 2000 instructing the plaintiff to construct a Tie-Beam to the project as an additional work to the lump sum contract.

**[20]** Further, the defendant's memorandum dated 17 July 2001 had asked the plaintiff to carry out variation "to the store room in Block B level 1 to FCC Room (M & E)", and the positioning and size of the door and window.

**[21]** Exhibit CMI9 sets out, in detail, the specifications of the defendant's variation orders, and instructions for additional works to be carried out and completed by the plaintiff.

**[22]** In the light of the above overwhelming and undisputed contemporary documents emanating from the defendant, I am unable to accept the above submission presented for the defendant.

**Defects**

**[23]** The defendant raised an issue based on the defects in the works carried out by the plaintiff and the plaintiff's duty to remedy the defects.

**[24]** The plaintiff's response is that the defendant has failed to condescend upon particulars pertaining to the defects and the quantity thereof.

**[25]** On my part, a proper perusal of the undisputed contemporary documents will bring to light the validity of this issue raised for the defendant.

**[26]** *Vide* plaintiff's letter dated 9 June 2003 relating to the parties' discussions on the variation order, rectification works and payment, the plaintiff confirmed the parties' agreement on the variation order for the sum of RM309,715.59 and that the defendant would pay the outstanding balance for contract works. Thereafter, the plaintiff would carry out the remedial works. It is significant to note that the defendant has not responded to the plaintiff's said letter.

**[27]** In the circumstances, I am of the view that the defects raised for the defendant being devoid of particulars cannot constitute a triable issue.

### Request For Inspection Forms

**[28]** The defendant raised the issue as to whether the defendant's "security officer" and "site safety officer" (collectively "the site officers") were qualified to sign the plaintiff's request for inspection forms on behalf of the defendant.

**[29]** It was contended for the plaintiff that the defendant has never raised this issue at the time when these forms were handed over to the defendant.

**[30]** It is my specific finding that these forms had been sent by the plaintiff *vide* letter dated 22 July 2002 to the defendant, confirming the handing over of the door keys. These forms have been duly signed by the defendant's site officers who had jointly inspected the project and were satisfied with the practical completion, for which the plaintiff requested the defendant to issue the certificate for practical completion. Each of these forms had been endorsed with the defendant's rubber stamp. Prior to this, there had been no complaint by the defendant as to the capacity of these site officers signing on behalf of the defendant. It is therefore untenable for the defendant to raise this issue at this juncture in order to frustrate the plaintiff's claim. I am unable to accept this as a triable issue.

### Liquidated And Ascertained Damages

**[31]** The defendant said that there was delay in the completion of the plaintiff's works, as a result of which the defendant had to pay liquidated and ascertained damages to the principal UTM from whom the final account could not be obtained.

**[32]** The plaintiff submitted that upon the defendant taking vacant possession of the project from the plaintiff, the defendant has not complained of any delay and that the defendant had not quantified the liquidated and ascertained damages arising from the alleged delay.

**[33]** In my judgment, the defendant's submission based on the plaintiff's delay is a bare allegation devoid of particulars. If the plaintiff had truly occasioned a delay, the defendant would have been able to provide the necessary particulars by way of set-off or counterclaim in order to prevent the signing of summary judgment, but the defendant had not done so.

**[34]** A bare claim for damages for delay without giving some reasonable detail or quantification is unlikely to result in any leave to defend: see *Keating on Building Contracts* p. 442.

**Retention Sum**

**[35]** The defendant finally submitted that the plaintiff's claim for the retention sum was premature as it could only be released after the issuance of the certificate of practical completion and after the expiry of the defects liability period.

**[36]** It was argued for the plaintiff that upon the expiry of the defects liability period, the plaintiff was entitled to claim the release of the retention sum.

**[37]** In order to ascertain the answer to the above submissions, it is necessary for me to refer to para E entitled "Term of Payment", under which cl. III reads as follows:

> III. All sums held under the Retention Fund shall only be released to you upon expiry of the Defects Liability Period but subject to your obligation of Making Good Defects (if any) within the period if such defect are (sic) manifestly due to poor workmanship or workmanship which is not in accordance with specification and not due to factors arising from whatever causes work not within or beyond the control of the sub-contractor.

**[38]** Upon a true construction of cl. III above, I am of the view that the release of the retention sum is to be effected upon the expiry of the defects liability period. There is no requirement that the release thereof is subject to the defendant's issuance of the certificate of practical completion.

**[39]** I am of the view that this issue raised for the defendant is nowhere to be found in the contract, upon which the parties have agreed. As there was no dispute that the defects liability period has expired, it follows that the plaintiff is entitled to the release of the retention sum.

A

## Conclusion

**[40]** As the defendant has obviously failed to raise any triable issue, summary judgment ought to have been entered for the plaintiff. I therefore allow this appeal, set aside the said decision
B of the learned registrar and allow the plaintiff's application to sign summary judgment against the defendant, with costs.

C

D

E

F

G

H

I